United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2319

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To be argued by
CHARLES L. WEINTRAUB

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2319

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

THOMAS MATTEO, FRANK BREEN
and JOHN INDIVIGLIO,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Thomas Matteo appeals from a judgment of conviction entered on June 14, 1974, in the United States District Court for the Eastern District of New York, after a one week trial before the Honorable Jacob Mishler, Chief United States District Judge and a jury. Frank Breen and John Indiviglio appeal from judgments of conviction entered on August 16, 1974, in the United States District Court for the Eastern District of New York after a one week trial before the Honorable Jacob Mishler, Chief United States District Judge, and a jury.

While all three appellants were charged in a single indictment, John Indiviglio was severed before the first trial because of a *Bruton* problem, and Frank Breen was severed during the first trial when it became known that

Mr. Breen's counsel had at one time represented a Government witness.

In a single count indictment No. 74 CR 122, Thomas Matteo, Frank Breen and John Indiviglio were charged along with unindicted co-conspirators, Frank Aguiar and James McCormack, with conspiring prior to May 1, 1971 to violate Sections 173 and 174 of Title 21, United States Code and on and after May 1, 1971, to violate Sections 812, 841(a)(1), 841(5)(1)(A), 951(a)(1) and 952 of Title 21, United States Code. The defendants were charged with conspiring prior to May 1, 1971 to unlawfully, wilfully and knowingly receive, conceal, buy, sell and facilitate transportation concealment and sale of heroin and on and after May 1, 1971 to unlawfully, wilfully, and knowingly distribute, possess, and possess with intent to distribute a Schedule I narcotic drug controlled substance.

On October 4, 1974, the defendant John Indiviglio was sentenced to imprisonment for a term of 12 years and a term of special parole of 5 years, the defendant Thomas Matteo was sentenced to a term of imprisonment of 10 years and a special parole term of 5 years, and the defendant Frank Breen was sentenced to a term of imprisonment of 7½ years and a special parole term of 5 years. Defendants are presently released on bail pending appeal.

Statement of the Case Against Thomas Matteo

A. Introduction

The testimony at trial established that between the Spring of 1968 and September 1972 Thomas Matteo was involved in a far reaching conspiracy to deal in large quantities of heroin, along with John Indiviglio, Frank Breen, Frank Aguiar and others. Matteo was supplying heroin to Frank Aguiar through a go-between named Tyler Somas

from the Spring of 1968 through the Fall of 1969. At that time, Mr. Matteo and Mr. Breen as partners began dealing in kilogram weights of heroin. From the Fall of 1969 through the Fall of 1971, Frank Aguiar continued purchasing heroin directly from Thomas Matteo on a regular basis and in ever increasing amounts. In the Spring of 1971 and again in September 1971 Mr. Aguiar, in fact, purchased 10 kilogram quantities of heroin from Thomas Matteo. A third ten-kilogram transaction was being negotiated in September of 1972 between Thomas Matteo and Frank Aguiar. Aguiar gave Matteo $60,000.00 representing partial payment for 10 kilograms of heroin. The next day Matteo was found shot in the home of John Indiviglio where he had gone to consummate the heroin transaction.

B. The Government's Case

In the Spring of 1968, Frank Aguiar was in the business of selling heroin. His source of supply was Tyler Somas. Being unsatisfied with the quality of the heroin he was receiving Aguiar met with Tyler Somas and Thomas Matteo. At that time, Matteo assured Mr. Aguiar that he would receive better quality heroin. Aguiar continued to receive heroin from Tyler Somas, the amounts increasing from ounces to ⅛th kilograms (Tr. 134-37).* In the Fall of 1969 Mr. Aguiar again became dissatisfied with the quality of the heroin and Somas at that time introduced him to Frank Breen. Breen assured Aguiar that he would give Aguiar better quality heroin and Breen stated that Aguiar would pick up directly from Mr. Breen thereafter (Tr. 138-39). Subsequently, Frank Aguiar picked up heroin from Frank Breen on two occasions (Tr. 140).

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* References in the form "(Tr.—)" are to the minutes of the trial of United States v. Thomas Matteo.

In November of 1969 Frank Aguiar met with Thomas Matteo and Frank Breen in a diner in Queens. Matteo wanted to know how much money Aguiar had made in dealing narcotics. When Aguiar told him the amount was somewhere around $67,000.00 Matteo stated that he couldn't understand why he had only received $2,000.00 from Somas (Tr. 141-42). In November, 1969, Frank Aguiar met with Thomas Matteo and Frank Breen in Mr. Aguiar's apartment. Matteo and Breen wanted to borrow $16,000.00 in order to help finance a heroin business dealing in kilogram quantities. They offered Mr. Aguiar a partnership but Aguiar said all he wanted in exchange for the loan was an opportunity to acquire heroin uncut and at cost (Tr. 147-50, 353-54).

Several days later Frank Breen and Thomas Matteo brought a kilogram of heroin to Frank Aguiar's apartment where Aguiar divided the heroin into 1/8th kilogram packages. Thereafter, Matteo and Breen took the heroin and left (Tr. 150-51, 355-56). Within a few days of this transaction Frank Breen returned to Frank Aguiar's apartment and asked Aguiar to store three 1/8th packages of heroin for Mr. Breen. Later on, either Breen or Matteo came up to the apartment and picked up the three 1/8th kilogram packages of heroin (Tr. 152-54, 357).

Throughout 1970 Aguiar continued purchasing from Thomas Matteo in increasingly larger amounts. By the late Fall of 1970 the amounts had reached 2 to 3 kilogram proportions (Tr. 155, 159). From November of 1970 to January of 1971, Mr. Aguiar and Thomas Matteo became partners in buying and selling heroin. The profits of the business during that time period were approximately $170,000.00 (Tr. 162-63). Thereafter, the partnership was terminated and Mr. Aguiar went back to being a purchaser of heroin from Mr. Matteo (Tr. 163).

In 1971 the amounts purchased by Mr. Aguiar from Thomas Matteo increased to three, four and five kilogram levels culminating in May, 1971 with a transaction involving 10 kilograms at a price of $180,000.00 (Tr. 163-64, 358). Again in September 1971 Aguiar purchased 10 kilograms from Thomas Matteo for a price of $190,000.00 (Tr. 164, 359-60).

In September, 1972 Frank Aguiar negotiated with Thomas Matteo for the purchase of 10 kilograms of heroin at a price of $270,000.00. Payment was to be made in the following manner: $190,000.00 was to be advanced by Matteo representing monies that Matteo owed to Frank Aguiar; $60,000.00 was to be delivered in cash from Aguiar to Matteo in advance of delivery of the heroin; and $20,000.00 was to be paid after the drugs were in fact delivered (Tr. 172-74).

The day after Aguiar delivered $60,000.00 to Thomas Matteo, Matteo was found shot in the home of appellant John Indiviglio, a man Mr. Matteo knew to be dealing in drugs (Tr. 520-21, 555). When the police found Mr. Matteo he had apparently been shot five times in the back, he held a handgun in his right hand with five live shells and one discharged shell. Within five feet of Mr. Matteo's body was found an attache case containing $350,050.00 in cash (Tr. 523-24). The house also contained large quantities of laboratory equipment some of which was suitable for determining the purity of narcotics and for weighing narcotics (Tr. 564-65).

C. The Defendant's Case

The defendant Thomas Matteo took the stand in his own behalf. He testified that he was a numbers runner between 1966 and 1972 and that he knew Frank Aguiar as a customer who placed bets with Mr. Matteo (Tr. 757-77). Matteo testified that he knew Aguiar to be in the nar-

cotics business and that while Aguiar tried to induce Matteo to enter that business Matteo declined (Tr. 577).

In a futile attempt to explain his presence in appellant Indiviglio's home in September 1972 and to discredit the Government's chief witness, Frank Aguiar, Mr. Matteo spun a tail in which he was the victim and Frank Aguiar was a loanshark who attempted to kill Mr. Matteo. Matteo testified that he had borrowed $14,000.00 from Aguiar in 1971 in order to go into business and that he was to repay $18,000.00 (Tr. 578-79, 581-82). He stated that in 1972 he still owed $11,000.00 to Mr. Aguiar and Mr. Aguiar was annoyed that payment had not been made promptly. Mr. Matteo testified that approximately one month before he was shot he met with Frank Aguiar and Aguiar threatened to cut Mr. Matteo with a knife if Matteo did not pay on time (Tr. 582-84). Matteo stated that shortly after this the rift between he and Mr. Aguiar was apparently patched up by Mr. Aguiar's brother and that Matteo thereafter negotiated to borrow an additional $60,000.00 to expand his business (Tr. 585-87). Finally, Mr. Matteo testified that he went into Mr. Indiviglio's home in order to meet Frank Aguiar and obtain the $60,000.00 loan which they had negotiated. He was in the house with Mr. Indiviglio and Indiviglio implied to him that appellant Indiviglio had some monetary business in common with Frank Aguiar. Matteo stated that while he was in Indiviglio's house a phone call was received and Indiviglio informed the caller that he would make sure that Matteo remained in the house until the caller arrived. Shortly thereafter, Indiviglio left the room and within a few minutes Mr. Matteo had been shot from behind and woke up in a hospital (Tr. 587-90).

On cross-examination Mr. Matteo affirmed that he had never in his life dealt in heroin or possessed it (Tr. 593). On page 613 of the transcript Mr. Matteo specifically denied

ever having a meeting in the Club International in the Spring of 1971 for the purpose of arranging to purchase narcotics.

D. The Rebuttal Case

In rebuttal the Government called Joseph Averso, who testified that in the Spring of 1971 he introduced Mr. Matteo to a Mr. Boise and that a meeting was held between Mr. Matteo and Mr. Boise in the Club International. Within a few days of this meeting Mr. Boise and Mr. Matteo utilized Averso's apartment in order to exchange narcotics (Tr. 531-32).

ARGUMENT

POINT I

The use of the grand jury testimony of James McCormack to impeach him was proper.

James McCormack was called as a Government witness. McCormack testified that he had been a narcotics addict, that he knew the defendant Thomas Matteo and that he had met with Mr. Matteo in 1967 or 1968 (Tr. 460-63). After it became apparent that Mr. McCormack was not going to remember anything about his contacts with Mr. Matteo that might incriminate Matteo, the Government was permitted to use Mr. McCormack's detailed grand jury testimony to attempt to refresh Mr. McCormack's recollection and to impeach him (Tr. 468-97). For the most part, Mr. McCormack testified that he did not recall whether or not he gave the answers that were reflected in the grand jury minutes.

Despite the fact that Mr. McCormack's testimony was not received in evidence, that during the Government's summation only one passing reference was made to Mr. McCormack (Tr. 715), and that no objection was made until after

Mr. McCormack had testified, appellant claims that use of Mr. McCormack's grand jury testimony was impermissible. The Government believes that it was proper under the circumstances to use Mr. McCormack's grand jury testimony to impeach him.

The rule is clear that prior inconsistent statements, whether sworn or not, may be used to impeach a witness. *United States* v. *Burket,* 480 F.2d 568, 572 (2d Cir. 1973) and cases cited therein. While Chief Judge Mishler did not allow the grand jury minutes into evidence, he may well have had discretion to do so under the holdings of this court in *United States* v. *Insana,* 423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970) and *United States* v. *De Sisto,* 329 F.2d 929 (2d Cir. 1964).

The factual situation concerning Mr. McCormack's testimony is almost identical to the facts presented in *United States* v. *Insana, supra.* In both cases a government witness testified to one or two relevant facts and then claimed a lack of memory of other relevant facts about which the witness had previously testified in detail before a grand jury. In both cases the detailed grand jury testimony was read back to the witness and he was asked whether those were the questions put and the answers that he had given. In each case, the witness for the most part claimed he could not remember the testimony given in the grand jury.*

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* In *Insana* the witness' responses included the following: "If he says I said it, I guess I did," and "I don't remember," and "If he has it on the record I guess I must have," and still later "I don't recall." *United States* v. *Insana, supra,* at 1168. Responses of Mr. McCormack in the instant case, include "I recall the conversation, but not that question and not that answer," (Tr. 470); "At the moment I can't recall what happened last night fully." (Tr. 473); "It may be down there, but I don't remember those questions at all" (Tr. 476); and "I am not sure at this time." (Tr. 487).

Finally in both cases, the trial court determined that the witness was hostile. *Id.* at 1167 and (Tr. 541, 573).

In *Insana,* even though the witness had not been cross-examined, the Court had little difficulty in disposing of the claim that the defendant had been deprived of his Sixth Amendment right to confront witnesses against him. The Court noted that the holding of *Bruton* v. *United States,* 391 U.S. 123 (1968), does not apply when the witness is on the stand and is at all times available for cross-examination. In the instant case, not only was Mr. McCormack available for cross-examination, but he was in fact subjected to effective cross-examination. While Mr. McCormack complained throughout his entire direct-examination that he did not feel well, he managed to go through the entire cross-examination without once voicing this complaint. In addition, Mr. McCormack's amnesia throughout direct examination was miraculously cured during his cross-examination: McCormack was able to remember details of crimes he had committed, those he had been convicted of, what jail sentences were imposed, which jails he was in fact incarcerated in, and what psychological treatment was administered while he was so imprisoned. In fact, Mr. McCormack attempted to undermine his grand jury testimony and his trial testimony during direct examination. In response to whether he had made certain statements in the grand jury, Mr. McCormack answered at page 747 "Again I would have to tell you that I was under sedation when those questions were taken. I had a lot of trouble in the jail last night. I was beaten."

In holding that the grand jury minutes were admissible as affirmative proof, this Court in *United States* v. *Insana, supra* stated at page 1170 the following:

> this does not mean that the trial judge's hands should be tied where the witness does not deny making the statements nor the truth thereof but merely falsified a lack of memory. Here Schurman had testified in

> detail before the grand jury, had already pleaded guilty, and on the stand identified Insana and testified to relevant events. Based upon these facts, the only rational conclusion is that Schurman was fully aware of the content of his grand jury testimony but wished to escape testifying against Insana and thus making a mockery of the trial. By conceding that his lack of memory was due to his desire not to hurt anyone, he impliedly admitted the truth of the extrajudicial statements harmful to the defendant. Thus we believe that these statements are admissible not only to impeach his claim of lack of memory, but also as an implied affirmation of the truth.

While McCormack did not expressly state that his lack of memory was caused by "his desire not to hurt anyone," his entire testimony and demeanor showed that this was exactly the reason that he was refusing to remember the events in question. Chief Judge Mishler expressly ruled that Mr. McCormack was a hostile witness and that his "display could be interpreted as nothing but coming here to aid Mr. Matteo's cause" (Tr. 541).

If by applying the rationale of *United States* v. *Insana, supra,* it is determined that McCormack by his words and actions affirmed his grand jury testimony then that testimony could have been admitted under the rule enunciated in *United States* v. *Borelli,* 336 F.2d 376, 390-91 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965). On the other hand if his conduct were to be interpreted as a denial of his grand jury testimony, that testimony would still be admissible under the rationale of *United States* v. *De Sisto, supra.* See *United States* v. *Klein,* 488 F.2d 481, 483 (2d Cir. 1973).

It is submitted, that if the trial court had discretion to permit the introduction of Mr. McCormack's grand jury testimony, *a fortiori,* the court had discretion to allow its use for impeachment purposes only.

POINT II

Appellant's statement to Special Agent Schnepper ruled inadmissible under *Miranda* was properly used in cross-examining the appellant.

Appellant Matteo claims that inculpatory statements he made to Special Agent Schnepper should not have been used to impeach him despite the fact that no objection was made to the introduction of these statements at trial and that Matteo testified that he had no involvement in possessing or dealing in heroin. This claim is without foundation.

After a pre-trial hearing Chief Judge Mishler suppressed the statements in question. Therefore, those statements were not used during the Government's case-in-chief. However, Mr. Matteo testified in his own behalf and affirmatively stated that he never was involved in a narcotics business with the government's chief witness Frank Aguiar (Tr. 575-77) and that in fact Mr. Matteo made his living as a numbers runner (Tr. 578). Mr. Matteo also testified that he never dealt in heroin, never possessed heroin (Tr. 593), and that his only knowledge of appellant Indiviglio's narcotics business resulted from a single casual conversation where Indiviglio indicated that years back he had been involved in his brother's narcotics business (Tr. 605-06).

With that foundation the Government was permitted to ask the following questions which related to statements held inadmissible under *Miranda*:

> Q. In that conversation, do you recall that Agent Schnepper said to you that he was aware that you had done five to ten kilograms of heroin at a time but wanted to know what Indiviglio was doing and that you responded that Indiviglio was doing thirty to forty kilograms at a time. Do you recall that conversation? A. Yes.

> Q. Is that what you said? A. Yes, that's right.
> Q. Did you also state that Indiviglio had lost his European connection a while ago, because the connection had gotten jammed up with the police in France? A. Right. (Tr. 612-13).

These questions and answers were clearly permissible to impeach Mr. Matteo under the reasoning of *Harris* v. *New York,* 401 U.S. 222 (1971) and *Walder* v. *United States,* 347 U.S. 62 (1954), thereby preventing the use of the shield provided by *Miranda* v. *Arizona,* 384 U.S. 436 (1966), as a sword.

POINT III

It was permissible to allow the Government to introduce rebuttal testimony.

The appellant contends that error was committed when the Government was permitted to introduce testimony of a contemporaneous similar act in rebuttal.

Beginning with the proposition that the trial court has wide discretion in permitting the introduction of rebuttal testimony, *United States* v. *Greenberg,* 268 F.2d 120 (2d Cir. 1959), it is difficult to perceive how the trial court could have abused this discretion in allowing in evidence of a contemporaneous similar crime after the defendant has testified that he at no time dealt in narcotics, handled narcotics, and specifically that he did not engage in a narcocotics transaction at the time and place testified about in rebuttal (Tr. 613, 631-32). In fact, it was within the discretion of the trial court to have even allowed the presentation of contemporaneous similar act evidence during the government's case-in-chief, see *United States* v. *Warren,* 453 F.2d 738, 745 (2d Cir. 1972), and whether the probative value of such evidence was outweighed by its prejudicial

effect was clearly a matter within the discretion of the trial court. See *United States* v. *Gardin,* 382 F.2d 601, 604 (2d Cir. 1967); *United States* v. *Deaton,* 381 F.2d 114 (2d Cir. 1967).

POINT IV

Appellant has not demonstrated that he was denied effective assistance of counsel.

Questioning certain of the decisions made by his trial counsel, appellant now claims that he was denied effective representation amounting to a constitutional deprivation of counsel under the Sixth Amendment. The Government does not believe that the appellant has demonstrated that he was denied effective representation.

The law in this area was effectively summarized in *United States* v. *Matalon,* 445 F.2d 1215, 1218-19 (2d Cir.), *cert. denied,* 92 S. Ct. 92 (1971):

> It has long been the law in this Circuit that the defendant must meet stringent standards in order to prevail on such a claim. "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice," *United States* v. *Wight,* 176 F.2d 376, 379 (2d Cir. 1949) *cert. denied,* 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950). This test has been adhered to in subsequent decisions of this court, *United States* v. *Currier,* 405 F.2d 1039, 1043 (2d Cir.), *cert. denied,* 395 U.S. 914, 89 S.Ct. 761, 23 L.Ed.2d 228, (1969); *United States ex rel. Maselli* v. *Reincke,* 383 F.2d 129, 132 (2d Cir. 1967); *United States ex rel. Boucher* v. *Reincke* 341 F.2d 971, 982 (2d Cir. 1965); *United States* v. *Garguilo,* 324 F.2d 795, 796 (2d Cir. 1963). "If counsel's rep-

resentation is so 'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interests,' *Kennedy* v. *United States,* 259 F.2d 883, 886 (5th Cir. 1958), *cert. denied* 359 U.S. 994, 79 S.Ct. 1126 3 L.Ed.2d 982 (1959), there has been a lack of compliance with the fundamental fairness essential to due process." *Reincke, supra* 383 F.2d at 132. "Errorless counsel is not required," *Garguilo supra,* 324 F.2d at 796, and "tactical errors or mistakes in strategy," *Id.* at 797 even if established, will not suffice to meet the high burden placed on the defendant. See also *United States ex rel. Sabella* v. *Follette,* 316 F. Supp. 452 (S.D.N.Y. 1970); *United States ex rel. Pugach* v. *Mancusi,* 310 F. Supp. 691, 716 (S.D.N.Y. 1970), aff'd, 441 F.2d 1073 (2d Cir. 1971).

Many of appellant's complaints relate to matters of strategy at the trial below. For example, appellant complains about his attorney's failure to object to the admission of testimony and physical exhibits concerning the events of September 27, 1972. At that time appellant had been found shot in the home of co-defendant John Indiviglio and near his body there was recovered an attache case containing $350,000.00 cash. Considering the testimony of Frank Aguiar that he had in fact given Mr. Matteo $60,000.00 the day before for use in the purchase of ten kilograms of heroin and the fact that Mr. Matteo himself had admitted that Indiviglio was a dealer in narcotics in a statement given to Special Attorney David Ritchie before trial, it is difficult to perceive how defense counsel might have kept out these items as irrelevant. It was therefore, obviously his strategy to allow these exhibits and this testimony into evidence as part of an overall attack on the witness Frank Aguiar. The thrust of the attack was to establish through Mr. Aguiar and his paramour Linda Piz-

zella that Mr. Aguiar had a propensity for violence and then further to attempt to link that up with Mr. Matteo's testimony that he had borrowed money from Mr. Aguiar and was attempting to borrow more money from Mr. Aguiar on September 27, 1972 when in fact he was shot by a person he never saw. Defense counsel argued that the gun found with Mr. Matteo was in fact the gun that Frank Aguiar testified about during Aguiar's cross-examination. To develop this theory it was necessary to allow these items into evidence and to require Mr. Matteo to take the witness stand and explain his version of the facts.

Appellant's contention that his trial counsel made no objection whatsoever to the use of the grand jury testimony of James McCormack is simply not accurate. In fact at pages 539-40 of the trial transcript trial counsel for the appellant objected to Mr. McCormack's testimony and moved that it be stricken on the grounds, 1. That he had not been declared a hostile witness, and the Government had in fact impeached its own witness; 2. That the testimony was hearsay; and 3. That its introduction deprived Mr. Matteo of his right of cross-examination. Trial counsel in fact moved to suppress post-arrest statements of Mr. Matteo and was effective in suppressing some of those statements after a pre-trial hearing. He also sought an instruction from the court that if Mr. Matteo took the stand a prior conviction which was not more than ten years old should not come in against Mr. Matteo because it was not probative of his veracity and he was successful in that motion.

The ability to use Mr. Matteo's pre-trial statements for the purposes of impeachment were so clear under the decisions in *Harris* and *Walder* that the failure to make the technical objection to the introduction of that testimony obviously had no bearing on the course of the trial.

It is, therefore, submitted that the appellant has failed to show "A lack of effective assistance of counsel . . . of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." See *Matalon, supra* at 1218.

Statement of the Case Against Frank Breen and John Indiviglio

A. Introduction

The evidence at the trial of appellants Indiviglio and Breen showed that they were involved along with appellant Thomas Matteo and Government witnesses Frank Aguiar, Tyler Somas and others in a chain conspiracy to distribute heroin. While the membership of the conspiracy changed from time to time and the function of a particular conspirator may have changed, the core conspirators and the purpose of the conspiracy remained intact. Appellant John Indiviglio headed the conspiracy as the main importer of narcotics directly from France into the United States. Directly underneath Mr. Indiviglio were Mr. Matteo and Mr. Breen functioning as major distributors of narcotics. From this source the chain of distribution extended downward. In 1968, appellant Matteo financed a trip to Europe for appellant Indiviglio, in an attempt to have Mr. Indiviglio establish a connection, i.e., a source for heroin in France. While this attempt proved fruitless, Mr. Indiviglio by 1971 was importing heroin into the United States in automobiles and stated that he had made "millions" from selling drugs. In the meantime, Thomas Matteo and Frank Breen were supplying narcotics to the Government witnesses Frank Aguiar and Tyler Somas. In fact, in the Fall of 1969, Matteo and Breen were in partnership dealing in kilogram quantities of heroin. From early 1970 through the early Summer of 1971, Frank Breen supplied heroin to Tyler Somas. In the meantime, Thomas Matteo was supplying multi-kilogram quantities of heroin to the witness Frank

Aguiar. Matteo in fact sold 10 kilogram quantities to Mr. Aguiar in May of 1971 and again in September of 1971. Finally in September, 1972 Aguiar again agreed to purchase 10 kilograms of heroin from Thomas Matteo and Frank Breen. On September 27, 1972, Thomas Matteo was shot in the home of John Indiviglio while attempting to arrange for the purchase of this heroin.

B. The Government's Case

Sometime in the Spring of 1968, Thomas Matteo approached Tyler Somas and asked Somas to handle his narcotics business because Matteo was to begin serving a term of imprisonment (T. 26).* At that time Thomas Matteo was being supplied with funds to help pay for his case by John Indiviglio (T. 219), and was living in an apartment in the upstairs portion of a house owned by Indiviglio. The downstairs apartment was used as a storage area and also contained a laboratory (T. 27-28). Matteo in the presence of Tyler Somas, picked up samples of heroin left in the laboratory and gave them to James McCormack, who would test the samples (T. 31, 35, 36). McCormack, at that time, told Frank Aguiar that he was dealing in heroin and that he was getting it from Indiviglio (T. 236). Aguiar "cut" some heroin for McCormack in McCormack's apartment (T. 236). The heroin was brown and McCormack stated that it was brown because it had been damaged in shipment and Indiviglio was treating it (T. 238).

Still during the Spring of 1968, Tyler Somas was introduced to Teddy Miller by Thomas Matteo. Somas began receiving heroin from Miller and sold it to James McCormack, Frank Aguiar and Sonny Alocco (T. 37, 233).

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* References in the form "(T. ——)" are to the minutes of the trial, of United States v. Frank Breen and John Indiviglio.

Before he entered prison Thomas Matteo told Tyler Somas that if Mr. Indiviglio ever needed money to travel to Europe for the purpose of acquiring a heroin connection (source) in France, Somas was to advance the necessary funds (T. 37-38, 40). Thereafter, a meeting was held at the Thunderbird Diner involving John Indiviglio, Thomas Matteo and Tyler Somas. Mr. Indiviglio stated that he was planning to travel to Europe. The discussion continued with the amount of money Indiviglio would require, the fact that Matteo was to enter prison shortly and that any money required by Mr. Indiviglio was to be provided by Tyler Somas, 50% from Somas' profits from the business and 50% from Matteo's (T. 41-42).

Several months later, Mr. Indiviglio asked Tyler Somas for five thousand dollars. Somas gave him three thousand dollars because that was all the cash Somas had (T. 43-44). When Mr. Indiviglio returned he told Tyler Somas that he had some problems in Europe; i.e., that someone in Newburgh, New York, had taken away Mr. Indiviglio's connection. Mr. Indiviglio stated that a letter would be arriving for this individual in Newburgh concerning a shipment that was coming into the country. He asked Mr. Somas to go to Newburgh, New York, and steal the letter from this individual's mailbox. (T. 44-45).

Tyler Somas continued receiving heroin from Miller until Miller was arrested. Shortly thereafter, Mr. Somas began receiving heroin from Frank Breen. During the first three quarters of 1969 Frank Breen delivered heroin (usually ⅛ kilogram) to Tyler Somas' apartment once every three to four weeks (T. 49-50).

In the early Fall of 1969, Frank Aguiar complained to Tyler Somas about the quality of the heroin. At a meeting attended by Breen, Somas and Aguiar, Breen stated that from then on Aguiar would be receiving the heroin from

Breen (T. 241-43). Thereafter, on two occasions, Frank Aguiar picked up ⅛ kilogram of heroin from Frank Breen (T. 243-44).

In November, 1969, Frank Aguiar met with Thomas Matteo and Frank Breen in a diner in Queens, New York. Matteo wanted to know how much money Aguiar had made from dealing in heroin. When Aguiar replied $80,000.00, Matteo became angry exclaiming that Tyler Somas had only given him $2,000.00 as his share of the profits (T. 245-46). This motivated Matteo to beat up Tyler Somas (T. 52).

In the late Fall of 1969, Matteo and Somas mended their wounds and Matteo asked Somas if he could lend Matteo $15,000.00. Somas was unable to advance the money. However, Mr. Somas called Frank Aguiar and suggested that Aguiar might lend the money to Matteo (T. 53-54). Thereafter, Thomas Matteo, Frank Breen and Frank Aguiar met in Aguiar's apartment. Matteo and Breen said they had a source who could provide kilogram quantities of heroin and needed $16,000.00 to start. Mr. Aguiar agreed to lend them $16,000.00 if he had the option of buying heroin from them uncut and at cost (T. 247-48).

Several days later Matteo and Breen returned to Frank Aguiar's apartment and Aguiar gave them $16,000.00 (T. 248-49). Shortly thereafter Thomas Matteo and Frank Breen brought one kilogram of heroin to Frank Aguiar's apartment. Aguiar divided it into eighths and Matteo and Breen left taking the heroin with them (T. 249-50). A few days later Frank Breen gave Aguiar three ⅛ packages of heroin to store and thereafter Thomas Matteo and Frank Breen returned and picked up the three packages (T. 250-51, 254).

In 1970, Frank Breen told Frank Aguiar that Breen was no longer in partnership with Thomas Matteo (T. 255).

Nevertheless, from the Fall of 1970 through the early summer of 1971, Breen again supplied heroin to Tyler Somas on at least seven occasions (T. 167-68, 174-75). On the last occasion Frank Breen delivered one pound of heroin to Tyler Somas (T. 57, 173-74).

From the Winter of 1969 until September, 1971, Frank Aguiar continued dealing in heroin with Thomas Matteo on a regular basis. The quantities increased reaching ten kilogram sales in the Spring and again in September, 1971 (T. 255-58).

John Indiviglio was not idle during this time; he made "millions" dealing in drugs which he imported into the United States in automobiles (T. 180, 183-84, 219-20).

In September, 1972, Thomas Matteo met with Frank Aguiar to discuss repayment of $190,000.00 advanced by Aguiar to Matteo during the course of their narcotics dealings. It was agreed that Matteo would sell ten kilograms of heroin to Aguiar for $270,000.00. Payment was to be made as follows: $190,000.00 owed by Matteo to Aguiar; $60,000.00 to be paid in advance by Aguiar; and $20,000.00 to be paid sometime after delivery (T. 262-64). The day before Matteo was shot, Frank Aguiar sent six packets each containing $10,000.00 in $100 bills to Thomas Matteo (T. 265).

On September 27, 1972, Thomas Matteo was found by the police in the kitchen of Mr. Indiviglio's home. Matteo had been shot five times in the back. He had a handgun in his right hand with one expended and five loaded shells (T. 361-62). Within five feet of Mr. Matteo was found an attache case containing $350,050.00 in cash (T. 364, 369).

Also found in the house were more than eight boxes full of laboratory equipment, a small percentage of which was

offered into evidence. This included equipment used in cutting and determining the melting point of heroin (T. 382-84). While no trace of drugs was found on the particular equipment tested (T. 396-98), and no scent of heroin was detected in the house by trained dogs, the dogs did detect the scent of heroin in the left front door of Mr. Matteo's car. (T. 403-04).

Finally, in May, 1974, Frank Breen told a social acquaintance, who was also an off-duty police officer, that they were trying to put Mr. Breen away for twenty years and that while they had recovered $350,000.00 they never found $90,000.00 in the trunk of a car (T. 459-61).

C. The Defendant's Case

The defendant Indiviglio called as witnesses Lynwood I. Deans, Louise Indiviglio, John Indiviglio (the defendant's son), Joan Duenas and Lawrence Duenas. Mr. Deans and Mrs. Indiviglio attempted to establish that there was no laboratory in the apartment below the one occupied by Mr. Matteo in 1968. Mrs. Indiviglio and John Indiviglio (the defendant's son) attempted to establish that the laboratory equipment found in Mr. Indiviglio's house either belonged to his son or were remnants of a drug store which had been leased by Mrs. Indiviglio. Mr. and Mrs. Duenas testified in an attempt to establish that the laboratory equipment found in Mr. Indiviglio's home was merely being stored there and that Indiviglio had a good reputation for truthfulness in the community.

The defendant Breen called Denis Dillon, formerly the Attorney in Charge of the Brooklyn Strike Force, and the defendant himself as witnesses. Denis Dillon was called in an attempt to impeach Tyler Somas. Mr. Breen testified that he was a social acquaintance of Police Officer Schmidt but denied ever making any statement to Officer Schmidt

concerning $90,000.00 being in the trunk of a car (T. 531). Breen admitted knowing Tyler Somas and Frank Aguiar but denied ever being involved in narcotics with them or anyone else (T. 532-36). Finally Breen denied ever meeting John Indiviglio before the day the trial commenced, Monday, August 12, 1974 (T. 538, 548).

D. The Rebuttal Case

In rebuttal the Government called two Special Agents of the Drug Enforcement Administration, John Brophy and Michael O'Conner. They testified that on May 25, 1974, they were conducting a surveillance of Beth's Bar and Restaurant, in Manhattan at which time they observed Frank Breen meet with John Indiviglio for approximately fifteen to twenty minutes and also meet with two black males, one of whom was Joseph Bryant, 6'4" and approximately 250 pounds (T. 610-13, 709-12).

E. The Surrebuttal Case

In surrebuttal the defendant Breen testified that he never met Indiviglio in Beth's Bar (T. 680-81). Mr. Indiviglio called his son's girlfriend Laura Camillas in an attempt to establish that Mr. Indiviglio was at his wife's home on the evening of May 24 through May 25, 1974 (T. 698-703).

POINT V

There was sufficient non-hearsay evidence to establish Indiviglio's participation in the conspiracy.

The appellant John Indiviglio maintains that the Government failed to establish his participation in the conspiracy by a fair preponderance of the non-hearsay evidence. In light of Mr. Indiviglio's statements during the conspiracy which established that he was the importer of the narcotics, the Government submits that appellant Indiviglio's claim is without foundation.

In order to permit hearsay evidence to be considered pursuant to the co-conspirator exception to the hearsay rule, the Government had to establish the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of such hearsay. *United States* v. *Santana,* 503 F.2d 710 (2d Cir. 1974); *United States* v. *Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub. nom. Lynch* v. *United States,* 397 U.S. 1028 (1970).

However, the independent evidence may be entirely circumstantial, *United States* v. *Manfredi,* 488 F.2d 588, 596 (2d Cir. 1973), and each piece of evidence should be viewed in conjunction with and drawing color from every other piece of relevant evidence. *United States* v. *Geaney, supra* at 1121.

What then is the independent evidence of Indiviglio's involvement in the conspiracy charged?

In 1968 Mr. Indiviglio met with Thomas Matteo and Tyler Somas. At this meeting, Matteo instructed Somas that he was to provide whatever funds Indiviglio needed for a trip to Europe; half of the funds from Somas' share of the business and the other half from Matteo's share

(T. 41). At that time, Matteo and Somas were dealing in heroin (T. 26, 37).

Within several months Indiviglio asked Somas for five thousand dollars and was given three thousand (T. 43-44). Sometime thereafter Mr. Indiviglio told Somas that he had in fact travelled to France, but he had had some difficulties there, i.e., a man in Newburgh, New York had taken away Indiviglio's connection (i.e., source of heroin), and that same man was to receive a letter about a shipment (of narcotics) (T. 45).

This admission, while involving an abortive transaction, clearly established that Indiviglio had, prior to that trip, a connection for narcotics in France. When viewed in conjunction with the following facts, that admission may well be sufficient to establish Indiviglio's participation in the conspiracy:

1. The trip was financed by Matteo and Somas' heroin business;

2. Prior to his incarceration Matteo lived in an apartment house owned by Indiviglio and picked up samples of heroin from a laboratory located in that same building (T. 27-28, 31);

3. Indiviglio gave Thomas Matteo money to help pay for Matteo's then pending court case (T. 219); and

4. In 1972, a large quantity of laboratory equipment was found in Mr. Indiviglio's home (T. 382).

Whether this quantum of evidence alone would be sufficient need not be decided, for there was presented significant additional independent evidence.

During the Summer of 1971, Mr. Indiviglio told Tyler Somas that he had made millions in the narcotics business and brought narcotics into the country in automobiles. At

trial this was related in the testimony of Tyler Somas' wife Fay who was present during the conversation (T. 180-81):

> Q. Was there any discussion of narcotics at that time? A. We didn't actually bring out the words heroin or drugs. They were discussing about the money that John had made.
>
> Q. What was said? A. John said he made millions.
>
> Q. Who had asked him? A. Tyler did.
>
> Q. Do you remember the words that Tyler used? A. I believe he just asked, approximately how much did he make during the years, and John replied, millions.
>
> Q. Was there any other discussion after that? A. They discussed a foreign car that John was importing into the United States.
>
> Q. What was said about that car, that foreign car? A. Tyler asked if he still had any left and John said yes, he had one.
>
> Q. Anything else? A. That was all.

After probing questions the jury was excused, the questioning continued and when the jury returned Mrs. Somas testified to the following (T. 184):

> Q. Tell us to the best of your recollection what Tyler said and what Mr. Indiviglio said. A. Tyler asked how he was getting it into the country and it refers to heroin because that was the subject they were discussing at that particular time; and Mr. Indiviglio said, the cars. Tyler asked if he had any more left and John said, one.
>
> Q. And did that discussion take place immediately after the discussion of how much money John had made? A. Yes.

Any question as to how Mrs. Somas knew the discussion concerned drugs was clarified by the cross-examination (T. 219-20):

> Q. In the course of this conversation in your presence, they had a discussion about importing heroin, that is your testimony. A. They talked about the cars.
>
> Q. The cars. Did they ever mention importing heroin? A. John mentioned drugs.
>
> Q. Did he ever mention importing drugs. A. Yes.
>
> Q. In these cars? A. That's what he was using the cars for.

This devastating admission thrusts Mr. Indiviglio into the highest level of the narcotics conspiracy: directly importing the drugs and making millions of dollars from their sale.

At this stage of the trial, Indiviglio's involvement in the conspiracy was established by a great deal more than a fair preponderance of the independent evidence.

However, additional independent evidence was presented.

Capping Mr. Indiviglio's involvement were the events leading up to September 27, 1972. Approximately a week before, co-conspirator Frank Aguiar met with Thomas Matteo and Aguiar agreed to purchase ten kilograms of heroin from Matteo for $270,000.00. Aguiar was to pay $60,000.00 in advance of the delivery (T. 262-64). On September 26, 1972, Aguiar gave $60,000.00 to Matteo (T. 265). Finally on September 27, 1972, Matteo was found in the kitchen of Mr. Indiviglio's home. Matteo had been shot five times in the back and he was holding a handgun with five loaded shells and one expended shell. Within five feet of his body

the police found an attache case containing $350,050.00 in cash (T. 361-62, 364, 369), and the scent of heroin was detected in the door of Matteo's car (T. 404).

What was Matteeo doing in Mr. Indiviglio's home on September 27, 1972, carrying $350,000.00 in cash and a loaded revolver?

One need not speculate in order to answer this query, in light of Matteo's prior dealings with Mr. Indiviglio, Indiviglio's position as an importer who had made millions from dealing in heroin and Matteo's express declaration that he would use those funds to acquire heroin. It is a fair inference that Mr. Matteo travelled to Mr. Indiviglio's home on September 27, 1972 to arrange to purchase heroin from Mr. Indiviglio.

The negotiations between Matteo and Aguiar during the week preceding September 27, 1972, may properly be considered non-hearsay evidence. They constitute verbal acts shedding light on Matteo's conduct which was circumstantial proof of Indiviglio's involvement. See *United States* v. *D'Amato*, 493 F.2d 359, 363-65 (2d Cir. 1974); *United States* v. *Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973).

POINT VI

It was not an abuse of discretion to permit a rereading of a portion of the Government's summation.

Appellant Indiviglio asked this Court to rule that Chief Judge Mishler's determination that a portion of the Government's summation be reread to the jury was an abuse of the trial court's discretion. The Government believes that it was well within the trial Court's discretion to make such a ruling.

It is axiomatic that the trial Court has discretion in conducting the trial and that the exercise of discretion will not be disturbed unless there is a showing of clear abuse of discretion resulting in prejudice to the appellant, *United States* v. *Wade,* 364 F.2d 931, 936 (6th Cir. 1966). From this starting point it is logical to conclude that a trial court should have wide discretion in determining whether the jury should be permitted to hear material a second time which was properly before the jury in the first instance.

This procedure is analogous to the accepted practice of allowing the government two summations: one prior to the defense summation and again in rebuttal.* In fact this is the procedure contained in the proposed Rules of Criminal Procedure Rule 29.1:

> After the closing of evidence the prosecution shall open argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal. Rules of Criminal Procedure, 62 F.R.D. 271, 319.

Both in the instant case and in the practice of permitting rebuttal summation by the Government, the jury is permitted to hear the Government twice. However, the jury was made aware that the burden of proof always rests with the Government and that the comments of counsel are not evidence in the case. It is therefore, submitted that the appellant has failed to show a clear abuse of discretion on the part of Chief Judge Mishler.

In addition, the procedure employed and circumstances surrounding the rereading of a portion of the Government's

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* There does not appear to be a documented breakdown of the number of Federal Districts, employing the procedure. It is however, employed by at least the following districts: the district of Columbia; the district of Maryland; the district of Nebraska; the Western District of Texas.

summation in this case neutralized any possibility of prejudice.

Prior to the rereading Chief Judge Mishler cautioned the jury that statements of counsel are not evidence and that the jury should not lose sight of the defense summations:

> Now, again understand that summation is not testimony. It's just the argument of counsel and don't lose sight of the other summations by the other lawyers,*. . . (T. 865).

This was followed by a portion of the Government's summation being read back, not by the prosecutor but by the court reporter (T. 865).

After the jury was satisfied that it had heard enough of the summation, the trial court again cautioned the jury that the summation is not evidence:

> The portion of the summation was a discussion by Mr. Weintraub of the evidence. Of course, that isn't evidence, it's only what he says, what he finds from the evidence (T. 868).

Furthermore, the jury obviously did not consider the summation as evidence. The summation was merely used as a guide to the evidence. The jury was satisfied to hear a portion of the summation dealing with the evidence. At the same time they asked to see exhibit 47, a shipping notice (A. 1).* The jury's inquiry did not stop there. Subsequently, the jury requested exhibit 52 (T. 867), several letters found in Mr. Indiviglio's home (A. 2-12).* Then the jury asked to see all the letters from Bob found in Mr. Indiviglio's home and read during the government's

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* References in the form "(A. ——)" are to the Government's Appendix.

summation (T. 867) (A. 13-15). Still later the jury requested exhibit 46, a photograph of the money found with Mr. Matteo in Mr. Indiviglio's house (T. 369). Finally they requested and heard the testimony of Frank Aguiar, on direct, on cross-examination by Mr. Indiviglio's counsel, on redirect and on recross by Mr. Indiviglio's counsel (T. 870-72).

Only then did the jury decide upon its verdict.

Powell v. *United States,* 347 F.2d 156 (9th Cir. 1966) and *People* v. *Miller,* 6 N.Y.2d 152, 188 N.Y.S.2d 534 (1959) cited by appellant are distinguishable. Those decisions deal with trials in which the jury was confused by the Judge's charge and his failure to clarify the applicable law.

POINT VII

The statement of appellant Breen was voluntary.

Frank Breen stated to a friend of his, James Schmidt, who was also a police officer, that "you know, they are trying to put me away for twenty years." Schmidt responded "Yeah" and Breen continued: "They found the $350,000.00 but there was another $90,000.00 in the trunk of the car."

The appellant claims the trial Court erred in concluding that this statement was shown to have been voluntary by a preponderance of the evidence and was therefore admissible, *Lego* v. *Twomey,* 404 U.S. 477 (1972).

It is submitted that the record below clearly supports the ruling of the trial Court.

Of critical importance at the outset is the fact that this admission was not made while Mr. Breen was in custody

or subject to any form of coercion. These factors were considered central to the determination of voluntariness in *Lego* v. *Twomey, supra* and *Jackson* v. *Denno,* 378 U.S. 368 (1964).

In fact, in the instant case the admission was spontaneous, made to a social acquaintance, in a social setting and not in response to any questioning by Mr. Schmidt (T. 423-25). The testimony demonstrates that Mr. Schmidt was not acting in an official capacity as a police officer at the time in question and in fact was unaware at that time that Mr. Breen was under indictment (T. 435-36).

The appellant would bind the trial Court to the conclusion of Mr. Schmidt, that Mr. Breen was "drunk". Without discussing the various meanings of that word, it is submitted that a court would improperly abdicate its function if it failed to inquire further.

The testimony is that on the evening in question Mr. Breen called a bar on Long Island owned by Mr. Schmidt's in-laws. Mr. Breen asked Mrs. Schmidt to pick him up in a bar in Manhattan. In fact, Mr. Breen was sufficiently oriented so that he could give Mr. Schmidt accurate directions in driving from Long Island to where Mr. Breen was located (T. 423-25, 431). Mr. Breen recognized Mr. Schmidt, was able to shoot a game of pool and leave the premises under his own power (T. 427-28, 460-62).

The conversation which took place was described by Mr. Schmidt in the following way at T. 462-63:

> Q. Did Mr. Breen seem to be coherent - -
>
> Mr. Krieger: Objection - -
>
> The Court: Overruled. I will allow it. Was the conversation coherent?

The Witness: Yes, sir.

The Court: Was he responsive? In other words, when you said something, did he say something that seemed to make sense?

The Witness: Yes.

These facts amply supported Chief Judge Mishler's determination of voluntariness. But Mr. Breen himself foreclosed any possible claim that the admission was involuntary. Taking the stand in his own defense he of course denied ever making the admission in question. He did however remember the night Mr. Schmidt came to pick him up in great detail: It was a Friday night, Mr. Breen arrived at the bar specifically the "Tin Pan Alley" at 10:00 o'clock. He was drinking scotch. Mr. Breen remembered that he called a bar on Long Island by dialing from a pay phone and spoke to Mrs. Schmidt, that Mr. & Mrs. Schmidt arrived at the Tin Pan Alley at a little after midnight, and that the three of them drank together. Mr. Breen remembered that he in the company of Mr. and Mrs. Schmidt left the bar at 2:00 a.m. and arrived in Long Island after 3:00 a.m., and that the three of them proceeded to Mr. Schmidt's in-law's house (Tr. 529-32, 540-43).

Mr. Breen illuminated his condition on the evening in question when he testified that he "fairly well" remembered everything that happened that night, (T. 542) and that he could hold his liquor "fairly well" (T. 541).

The totality of the circumstances reveals the voluntary nature of Mr. Breen's admission by a preponderance of the evidence.

Nor is this a situation like *Pea* v. *United States,* 397 F.2d 627 (D.C. Cir. 1967). In that case while the defendant was described as coherent, he was not only intoxicated

but had shot himself in the head; the bullet destroyed his right optic nerve, sprayed bone and bullet fragments in his sinuses and lodged in the middle of the skull. He had lost all vision in his right eye and most in his left eye. The attending physician described him as lethargic and indifferent to protecting himself. Against this backdrop, he was questioned in the hospital by a police officer who failed to advise the defendant of his constitutional rights.

Not only is the fact pattern in *Pea* significantly different from the present one, the standard applied in that case was "proof beyond a reasonable doubt."

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: January 20, 1975

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